Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET. AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET. AL.,

Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

BRIEF OF THE ANTI-DEFAMATION LEAGUE, ET. AL., AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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BRIEF OF THE ANTI-DEFAMATION LEAGUE, ET. AL., AS *AMICI CURIAE* SUPPORTING RESPONDENTS AND URGING AFFIRMANCE

INTERESTS OF *AMICI CURIAE*

The religious and civil liberties organizations joining this brief represent a diversity of theologies and worldviews. Although their beliefs and missions vary, *Amici* are united in supporting robust religious freedom for all, including for individuals whose personal actions may not align with their employers' beliefs.[1]

The **Anti-Defamation League** ("ADL") was organized in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment to all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and safeguarding individual religious liberty. A staunch supporter of the religious rights and liberties guaranteed by both the Establishment and Free Exercise Clauses, ADL vigorously supported the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et. seq.* ("RFRA"), as a means to protect individual religious exercise, but not as a vehicle to enable some Americans to impose their religious beliefs on others.

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[1] Pursuant to this Court's Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *Amici* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), *Amici* note that all parties have filed letters with the Clerk of Court reflecting their blanket consent to the filing of *amicus* briefs.

Bend the Arc: A Jewish Partnership for Justice ("Bend the Arc") is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

The **Hindu American Foundation** ("HAF") is an advocacy organization for the Hindu American community. HAF seeks to cultivate leaders and empower future generations of Hindu Americans. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. Since its inception, HAF has made legal advocacy one of its main areas of focus. From issues of religious accommodation, religious discrimination, and hate crimes to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF informs the public and the courts about various aspects of Hinduism and issues impacting the Hindu American community.

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all

Americans and is not misused to favor the rights of some over others.

Founded in 1929, the **Japanese American Citizens League** is the nation's largest and oldest Asian-American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry.

The **Jewish Social Policy Action Network** ("JSPAN") is a non-profit organization dedicated to protecting the constitutional and civil rights of minorities and the vulnerable as a reflection of the Jewish commandment to engage in *tikkun olam*, the "repair of the world." JSPAN's interest in this case stems from the longstanding commitment of the American Jewish community to ensure religious pluralism and the free expression of religion by citizens of diverse faiths. Deeply committed to protecting the interests of all those who wish to express themselves on matters of conscience, JSPAN recognizes that a careful judicial balance needs to be struck so that purely subjective claims of a substantial burden on religious rights by one group do not impede others' ability to enjoy their own rights under the law.

Keshet is a national grassroots organization that works for the full equality and inclusion of lesbian, gay, bisexual, and transgender ("LGBT") Jews in Jewish life. Led and supported by LGBT Jews and straight allies, Keshet strives to cultivate the spirit and practice of inclusion in all parts of the Jewish community. Through training, community organizing, and resource development, Keshet partners with clergy, educators, and volunteers to equip them with the tools and knowledge they need to be effective agents of change.

National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children and families and by safeguarding individual rights and freedoms. NCJW's principles state that religious liberty and the separation of religion and state are constitutional tenets that must be protected and preserved in order to maintain our democratic society. NCJW also endorses and resolves to work for comprehensive, confidential, and accessible family planning and reproductive health services, regardless of age or ability to pay.

The **Organization of Chinese Americans** ("OCA") was established in 1973 as an Asian Pacific American civil rights organization. Through its over 100 chapters and affiliates, OCA continues to advocate for equal protections and equitable application of the law for all Asian Pacific Americans, including the protection of civil liberties and religious freedom.

People For the American Way Foundation ("PFAWF") is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principles of the Religious Freedom Restoration Act and the Free Exercise Clause as a shield for people of all faiths when their free exercise is substantially burdened. Indeed, PFAWF's advocacy affiliate, People For the American

Way, was deeply involved in drafting and helping secure the enactment of RFRA in order to restore by statute the protection that the Free Exercise Clause had previous provided. PFAWF is concerned, however, about efforts to transform this important shield into a sword to attack the rights of third parties.

Religious Coalition for Reproductive Choice ("RCRC") was founded in 1973 to bring the moral power of religious communities to the reproductive health, rights and justice movements. RCRC is a national community of religious organizations and faithful individuals dedicated to achieving reproductive justice through education, organizing and advocacy. RCRC seeks to elevate religious voices wherever faith, policy and reproductive lives intersect.

Religious Institute is a multi-faith organization advocating for sexuality education, reproductive justice, and the full inclusion of women and LGBT people in faith communities and society. The Religious Institute calls for a faith-based commitment to sexual and reproductive rights, including widespread access to safe family planning and reproductive health services. The Religious Institute affirms the rights of all individuals to apply or reject the principles of their faith without legal restrictions and opposes any attempt to make specific religious doctrine the law for all Americans.

Women's League for Conservative Judaism ("WLCJ") is the largest synagogue-based women's organization in the world. As an active arm of the Conservative/Masorti movement, WLCJ serves hundreds of affiliated women's groups in synagogues across North America. WLCJ opposes any legislative efforts to deny a woman's right to meaningfully access

the full range of reproductive health services and fully exercise her constitutionally protected reproductive rights. WLCJ also opposes any effort that would restrict funding of an institution or program which provides health services including education, birth control or abortion.

SUMMARY OF ARGUMENT

Congress enacted RFRA to provide a judicial method for accommodation from federal laws which impose substantial burdens on religious exercise. While the Constitution defers to what a person's beliefs are, that same level of deference does not extend to defining what a substantial burden is. The Government may accept that persons sincerely believe their religion is being violated without conceding that the perceived violation is substantial. Substantial burdens are not measured by the fervency of subjective belief, but rather the significance of objective effect.

The relative burden on religious exercise is an objective question of fact appropriate for courts to decide. Evaluating the substantiality of a burden is not a task unique to religion law. It has long been undertaken in related—yet indisputably secular—First Amendment contexts. This inquiry is not easily reduced to bright-line rules. Rather, it calls for an assessment of all relevant factors. These factors may include the difficulty (in terms of, *e.g.*, time and cost) for the person to comply with the law absent an accommodation, the success of prior government actions to alleviate the burden, and the extent to which the requested accommodation would affect the religious person's actions only, versus affecting the independent actions and civil rights of third parties.

In these consolidated cases, the objective facts do not support a substantial burden. The Government's opt-out procedures, including Employment Benefits Security Administration ("EBSA") Form 700, allow organizations to self-certify that they have religious objections to providing contraceptive insurance coverage. The form requires an organization to write in just four boxes, providing its name, authorized agent's name, contact information, and signature. The form is itself an accommodation to alleviate religious objections to directly providing contraceptive coverage. Once an organization opts-out, both the provision of insurance and any purchase or use of contraceptives is ultimately undertaken by the independent actions of third parties. Under these circumstances, submitting EBSA Form 700 does not substantially burden Petitioners' religious exercise.

ARGUMENT

I. DEMONSTRATION OF A SINCERELY-HELD RELIGIOUS BELIEF IS INSUFFICIENT TO PROVE A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE

A. Religious Sincerity Is A Threshold Inquiry Into A Claimant's Subjective State Of Mind

To request an accommodation for religious exercise under the Religious Freedom Restoration Act, a person must first demonstrate that he or she holds a sincere religious belief. *See* 42 U.S.C. § 2000bb-1(a). Accommodation claims based on political or philosophical beliefs do not qualify. *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *United States v. Seeger*, 380 U.S. 163, 165 (1965).

Sincerity calls for a factual determination regarding an adherent's subjective state of mind. When investigating sincerity, the Government "may appropriately question whether a [person's] religiosity, asserted as the basis for a requested accommodation, is authentic." *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). Because courts are "ill-equipped to sit in judgment on the verity of an adherent's religious beliefs," however, the sincerity inquiry is limited to a credibility assessment; inquiry into whether a subjective belief is objectively true trespasses on the domain of the Establishment Clause. *Patrick v. LeFevre*, 745 F.2d 153, 157 (2nd Cir. 1984). To demonstrate sincerity, a claimant need only show "an honest conviction" that the Government is requiring her to act contrary to her religion. *Thomas v. Review Bd. of Indian Employment Sec. Div.*, 450 U.S. 707, 715–16 (1981).

Although limited, the sincerity inquiry is nonetheless meaningful: courts have found insincerity where the asserted beliefs suspiciously align with secular self-interests or are otherwise incredible. *E.g. United States v. Quaintance*, 608 F.3d 717, 718–19 (10th Cir. 2010) (professed religious beliefs in worshiping marijuana could not be used "as cover for secular drug activities"); *see also Holt*, 135 S. Ct. at 867 (officials may investigate whether a prisoner is using religion to "cloak illicit conduct").

The Government frequently has little desire to dispute individual religiosity and often concedes sincerity upfront. *See, e.g., Holt*, 135 S.Ct. at 862 (conceding that Muslim prisoner sincerely believed his religion required growing a beard); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (conceding that Brazilian Christian

Spiritualist sect sincerely believed a sacrament required *hoasca* tea); *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 833 (1989) (conceding nondenominational Christian sincerely believed he should not work on Sundays). Unsurprisingly, the Government has likewise conceded sincerity here. *See* Resp't's Br. 33 ("We do not suggest that petitioners' assertion of a substantial burden rests on any theological error or misjudgment, or that their beliefs are not sincerely held."). There is no dispute that Petitioners believe that submitting EBSA Form 700 will "facilitate" use of contraception, "make them complicit in wrongdoing and create 'scandal' in violation of Catholic moral teaching." Pet'rs' Nos. 14-1418, 14-1453 & 14-1505 Br. 2; *see also* Pet'rs' Nos. 15-35, 15-105, 15-119, & 15-191 Br. 2 (Petitioners "sincerely object to being forced to facilitate access to contraceptives").

The Government's concession on sincerity should mark the end of any inquiry into Petitioners' subjective beliefs. The concession guarantees that Petitioners' claims fall within the RFRA framework—but it does not alone suffice to make out Petitioners' *prima facie* case, establish a substantial burden, and trigger strict scrutiny. Meaningful judicial review requires the rest of the RFRA analysis to be conducted pursuant to doctrines of law, not faith. Petitioners' uncontested belief that submitting EBSA Form 700 facilitates sin indicates that a burden may *exist*; it does not simultaneously prove that the burden is *substantial*.

B. Finding A Substantial Burden On Religious Exercise Requires An Objective Inquiry Detached From Sincerity

The determination of whether a burden on religious exercise is substantial requires an objective assessment of the actual effect of state action. It should not duplicate the inquiry into subjective religious belief.

Even prior to *Employment Div. v. Smith*, 494 U.S. 872 (1990), the substantiality of a burden was an objective inquiry.[2] In *Bowen v. Roy*, the Court held that despite a sincere religious conviction that a Social Security number robbed the unique spirit of his daughter, the Government requiring a parent to use the number on a form did not impose a substantial burden. 476 U.S. 693 at 696, 702–03 (1986). Likewise, when faced with a religious challenge to the construction of a Forest Service road through sacred ground, the Court accepted that Indian tribes believed the road posed a "grave" threat to their religious practice, but it declined to measure the burden by comparison to that religious belief. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988). Objectively, the Government's choice to build a government road on government property did not

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[2] As explained in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-62 (2014), Congress passed RFRA to provide religious accommodations to generally-applicable laws, with the purpose of tracking pre-*Employment Div. v. Smith* Free Exercise Clause jurisprudence. *See* 42 U.S.C. § 2000bb (RFRA "restore[s] the compelling interest test [to]...all cases where free exercise of religion is substantially burdened.").

impose a "heavy enough" burden to trigger strict scrutiny and warrant a religious accommodation. *Id.* at 447, 453 ("Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.").

The "location of the line" between permissible and impermissible burdens "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 451. "[C]laims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the Government. Not all burdens on religion are unconstitutional." *Bowen*, 476 U.S. at 702. Neither are all burdens, in the post-RFRA world, substantial. *Cf. World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 538 (7th Cir. 2009) ("Any land-use regulation that a church would like not to have to comply with imposes a 'burden' on it, and so the adjective 'substantial' must be taken seriously lest RLUIPA be interpreted to grant churches a blanket immunity from land-use regulation.").[3]

C. Conflating Sincerity With Substantial Burden Threatens Due Process

When Congress modified burden with "substantial," it intended substantial to have legal import. As Senator Kennedy explained, the word substantial eliminated the requirement that the Government

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[3] RLUIPA is a sister statute to RFRA that allows state prisoners and land-use applicants "to seek religious accommodations pursuant to the same standard as set forth in RFRA." *Holt*, 135 S. Ct. at 860 (quoting *Gonzales*, 546 U.S. at 436).

satisfy strict scrutiny "for every government action that [has] an *incidental* effect on religious institutions." 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (emphasis added). Unless "substantial" has "significant meaning, the RFRA standard becomes a lazy gatekeeper, requiring the state to meet a high burden in order to refute almost any religious accommodation." Kara Lowentheil, *When Free Exercise is a Burden: Protecting "Third Parties" in Religious Accommodation Law*, 62 Drake L.R. 433, 497 (2014). RFRA's qualifying language would be rendered a nullity if an individual's self-attested belief sufficed to establish that a burden is substantial.

If professed belief alone could serve as the driving force behind substantiality, innumerable federal regimes would be thrown into question. Petitioners state that they "do not object to *any* government action that provides contraceptives to their employees," only to "government-prescribed actions to facilitate that coverage." *See* Pet'rs' Nos. 15-35, 15-105, 15-119, & 15-191 Br. 2. But despite this assurance, Petitioners propound no test which would impose such a limit; instead, they define "facilitate" by reference to religious belief, not secular law. *See* Resp't Br. 46–47 ("Petitioners' religious beliefs do not accept the distinction between their own act of opting out of the contraceptive coverage requirement and the government's subsequent arrangements with third parties.").

By Petitioners' same subjective logic, religious exercise could be substantially burdened by the Health Insurance Portability and Accountability Act's privacy protections (which enable employees to obtain a contraception prescription without the employer's knowledge), 42 U.S.C. § 1320d–6; by the Fair Labor

Standards Act's wage protections (which provide employees with money to purchase contraception), 29 U.S.C. § 206; or by the payment of any Internal Revenue Service taxes (which may ultimately reach the Department of Health and Human Service's budget and fund the provision of contraceptives).[4] Violations of each of these laws carry significant penalties, indistinguishable from the Affordable Care Act. *See e.g.*, 42 U.S.C. § 1320d–5 (imposing penalties for violations of HIPPA); 29 U.S.C. § 216 (imposing penalties for failing to comply with FLSA); 26 U.S.C. § 6651 (imposing penalties for failure to file tax return or pay tax). If sincerity alone proved substantiality, each of these hallmark provisions would be improperly subjected to RFRA's strict scrutiny.

Petitioners' subjective logic also converts factual questions into incontestable legal conclusions. This Court has long declared that legal elements cannot be satisfied by self-interested factual declarations alone. *See, e.g., Hoffman v. United States*, 341 U.S. 479, 486, (1951) (a witness cannot invoke Fifth Amendment rights "merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified."). As James Madison once advanced, "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment." The Federalist No. 10

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[4] Relatedly, the Court recognizes that federal taxpayers do not have "standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343 (2006).

(1787). The American adversarial process is based on the ability of opposing parties to contest proffered facts, so that courts can make the ultimate determination of legal effect. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

Adopting Petitioners' articulation of substantial burden would violate these principles, because it would allow religious persons to serve as their own arbiters. The Government's ability to conduct a meaningful cross-examination would be effectively negated if burdens were weighed by self-reference to religious doctrine. After all, particular sensitivities surrounding the Establishment Clause forbid courts "from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828, (2000) (plurality opinion) (citing *Employment Div.*, 494 U.S. at 887 (collecting cases)). "[T]he very process of inquiry" into religious positions "may impinge on rights guaranteed by the Religion Clauses." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). To permit claims of substantial burden to go unchecked without objective limits would "make the professed doctrines of religious belief superior to the law of the land, and in effect [ ] permit every citizen to become a law unto himself." *Employment Div.*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878)).

* * *

To effectuate proper application of RFRA, the Court should clarify that the substantiality of a burden on religious exercise is an objective inquiry, wholly

independent from the limited subjective inquiry into sincerity of religious belief.

II. OBJECTIVE INQUIRY INTO WHETHER GOVERNMENT ACTION SUBSTANTIALLY BURDENS RELIGIOUS EXERCISE ASSESSES THE EFFECTS OF THE CHALLENGED ACTION ON BOTH ADHERENTS AND THIRD PARTIES

A. Objective Assessments Of Substantiality Inform Other Areas Of First Amendment Law

There is nothing unique about the religion context that prevents courts from making an objective assessment of substantial burdens. This Court, in other First Amendment-related contexts, has readily assessed substantiality by reference to objective facts. The approach adopted by these cases is instructive.

Campaign finance and other election-speech cases conduct a legal inquiry similar to the burden-shifting strict scrutiny required by RFRA. If a campaign finance restriction "imposes a substantial burden on the exercise of the First Amendment right," the provision cannot stand unless it is "justified by a compelling state interest." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 740 (2008) (internal citation omitted). This Court recently grounded an inquiry in objective factors to assess the facial constitutionality of Washington's disclosure requirements for signatories to state law referenda petitions. *John Doe No. 1 v. Reed*, 561 U.S. 186, 190 (2010). The Court looked to the actual speech affected (signing a petition), the scope of Washington's laws related to that speech, the potential consequences of that speech (possible disclosure online if a third party submitted a public

records act request), and how other similarly situated actors had responded to the same burden. *Id.* The Court ultimately found it unrebutted "that only modest burdens attend the disclosure of a typical petition," and dismissed the facial challenge. *Id.* at 201. Justice Stevens concurred, explaining that government action should not "be upset upon hypothetical and unreal possibilities." *Id.* at 219 (Stevens, J., concurring (citation omitted)). "Just as we have in the past, I would demand strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech." *Id.*

This Court also frequently examines substantiality when evaluating whether statutes are facially invalid for "prohibit[ing] a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). Here again, the Court has "vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Id.* (emphasis in original). In *Williams*, the Court evaluated the language, purpose and history of a criminal child pornography statute, as well as the actual and likely fact patterns arising under it, to assess its substantive scope. *Id.* The Court ultimately found just *one* area where it was possible the law could have an unconstitutional application—the production of documentaries. This was not enough to render the statute *substantially* overbroad. *Id.* at 302–03. All other objections were likewise insubstantial, "demonstrat[ing] nothing so forcefully as the tendency of our overbreadth doctrine to summon forth an endless stream of fanciful hypotheticals." *Id.* at 301.

In both of the foregoing examples, the Court looked to define the scope of the law, then narrowed down to

the specific action challenged, listed the actual harms that could reasonably follow, and made a relative assessment of how attenuated, unlikely, or speculative those harms were. In each case, the Court explained some of the parties' subjective thoughts to provide context, but did not rely on subjective evidence when reaching an ultimate conclusion of objective effect. The same principles should dictate examination of substantial burdens in the RFRA context.

Indeed, this Court has already modeled how to evaluate objective facts even when religion is central to the underlying claim. When setting forth the bounds of the ministerial exception, this Court recently illustrated how to draw an analogous line between subjective religious perception and objective fact. Without either accepting by Lutheran Church *fiat* that an elementary school teacher qualified as a minister or resorting to exegesis of religious doctrine, the Court conducted a secular evaluation of an elementary school teacher's formal title, education, substantive responsibilities, self-referential admissions, and participation in rituals. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 701–708 (2012). Only after undertaking this assessment of objective facts did the Court make the legal determination that the teacher "was a minister covered by the ministerial exception." *Id.* at 708.

John Doe, *Williams*, and *Hosanna-Tabor* provide a model framework for the inquiry the Court should undertake here into substantiality. Whether a burden on religious exercise is substantial requires a flexible assessment of all relevant facts. Just as the Court declined "to adopt a rigid formula for deciding when an employee qualifies as a minister," *Hosanna-Tabor*, 132

S. Ct. at 707, so too should the Court decline to adopt any rigid lines for assessing substantiality.

B. Courts Have Already Developed Objective Factors To Consider In Assessing Substantiality

Courts of Appeals have already developed objective factors to assess the "actual, tangible burdens" that government action imposes on religious exercise. *See Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 99 (1st Cir. 2013). Flexible application of these and other factors informs whether a burden on religious exercise is substantial. *See, e.g.*, *World Outreach*, 591 F.3d at 539 ("[S]ubstantiality is a relative term—whether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question.").

These objective factors include:

1. What concrete actions must the religious person take, because of the government imposed burden? This includes an assessment of the resources, in terms of time and money, the religious person must devote to compliance. Frequent, resource-intensive steps towards compliance may constitute a substantial burden, *see, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (undue burden existed where state required Amish to daily attend secondary school), while one-time events will not. *See, e.g.*, *John Doe No. 1*, 561 U.S. at 216 (a one-time act lessens the force of the burden). Heavy monetary expenses may constitute a burden, while "the mere existence of some expenses," "only some of which are . . . traceable" to the challenged ordinance do not. *Roman Catholic*, 724 F.3d at 99. Indirect effects or mild logistical inconveniences do not rise to a substantial level. *See,*

e.g., *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (no substantial burden where, even though it offended religious sensibilities, artificial snow production on a sacred mountain required no direct action from and imposed no punishment on the adherents); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228 (11th Cir. 2004) (only minor burden where zoning decision would cause parishioners to walk a few extra blocks to synagogue).

2. Has the Government made any prior attempts to alleviate the burden? *See, e.g.*, *Lyng*, 485 U.S. at 454 (crediting Government with taking "numerous steps ... to minimize the impact that construction ... will have on the Indians' religious activities"); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 615-16 (7th Cir. 2015) (federal government had alleviated the substantiality of the contraception coverage burden by offering a religious opt-out form). Steps to lessen the burden may succeed in rendering it insubstantial.

3. What is the punishment for non-compliance? *See, e.g.*, *Gonzales*, 546 U.S. at 425 (substantial burden exists when religious sect faces criminal prosecution for possession of small amounts of controlled substance used in sacramental tea). *But see Roman Catholic*, 724 F.3d at 99) (the possibility of statutory penalties for non-compliance "does not mean that the process of application" is itself burdensome).

Applying these factors to the situation before the Court demonstrates that Petitioners have not been substantially burdened. First, "[i]t is important at the outset to define the scope of the challenge." *John Doe No. 1*, 561 U.S. at 194. Petitioners' challenge is ostensibly *not* to the act of filling out EBSA Form 700 or notifying the Government of a religious objections in

and of itself—they just wish that the opt-out process "triggered" different consequences. But these consequences of opting out are at best indirect: Petitioners are excused from providing, paying for, contracting for, or otherwise legally facilitating contraceptive coverage. Petitioners' subjective offense at third parties arranging independent contraceptive coverage for their employees is not an objective, concrete burden on them. *See Hobby Lobby*, 134 S. Ct. at 2763 (opt-out accommodation "effectively exempt[s]" employers from contraceptive-coverage requirement). To the extent Petitioners do object to the notification itself—filling out a one-time, four-box form to obtain a permanent religious accommodation is minor, not substantial.

Second, the Government's numerous steps to credit Petitioners' religious beliefs during the history of the contraceptive coverage debates show that the extent of any burden has been reduced. *See* Coverage of Certain Preventative Services under the Affordable Care Act, 78 Fed. Reg. at 39, 878 (objecting employer may opt out of any requirement to "contract, arrange, pay or refer for contraceptive coverage"); *see also generally* Resp't Br. 11–19.

Third, Petitioners face no direct punishment for failing to fill out EBSA 700—that form is not a government mandate, it is an optional accommodation. The punishments that the Petitioners fear come only if Petitioners *either* do not directly provide contraceptive coverage *or* are not excused by virtue of an exemption. *See* 45 C.F.R. 147.131(c)(1). EBSA 700 is the mechanism by which they *both* are exempted from providing coverage *and* avoid penalties. In other words, penalties do not flow from Petitioners' assertion of a religious objection; rather, they flow from

Petitioners' insistence that their religious objection should prevent third parties from separately providing contraceptive coverage. Petitioners' subjective belief regarding the nature of these penalties is not a substantial burden as a matter of objective law.

In sum, objective assessment of the burdens imposed on Petitioners through the Government's religious opt-out process show that those burdens are minimal.

C. Constitutionally Valid Assessments Of Substantial Burdens Must Account For Effects On Third Parties

The foregoing factors, however, are incomplete, if they fail to wrestle with burdens on third-party non-beneficiaries. *See Cutter*, 544 U.S. at 720. This Court has long held that shifting adverse effects of religious exercise onto third parties—who possess their own First Amendment and RFRA rights—is an unconstitutional Establishment Clause violation. *See Estate of Thornton v. Caldor*, 472 U.S. 703 (1985). Statutes cannot "impermissibly advance[ ] a particular religious practice" and force "others [to] adjust their affairs" to accommodate it. *Id.* at 709–10. Just as a religious accommodation statute cannot absolutely require an employer to conform her business to the religious practices of a Sabbatarian employee, *id.* at 709, RFRA cannot absolutely require employees to unyieldingly conform their personal contraception practices to the religious beliefs of their bosses. *See* 42 U.S.C. § 2000bb–4 (RFRA allows accommodations "to the extent permissible under the Establishment Clause"). *Cf. Trans World Airlines v. Hardison*, 432 U.S. 63, 80 (1977) (Title VII religious accommodations cannot prefer religious employees over all others).

Evaluating the impact on third parties should be accomplished through a sliding assessment of the extent to which the requested accommodation directly affects the religious person's actions, versus the extent to which it dictates third parties' independent actions and imposes upon third parties' independent civil rights. *See, e.g.*, *Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring) (accommodating a prisoner's religious belief to grow a half-inch beard does not "detrimentally affect others who do not share petitioner's belief"). As religious claimants' core objections become more subjective, indirect and attenuated from the claimants' own objective actions, the burden on religious exercise should become less substantial.[5]

In addressing First Amendment claims, this Court has already held that intervening "private choice" breaks the causal chain between government action and religious choice. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). In *Zelman*, government's "incidental" advancement of religion by providing tuition vouchers to private religious schools was "reasonably attributable to an individual recipient, not to the government." *Id.* at 652. The same principle applies to the substantial burden analysis—it can only be an "incidental" burden on religion if the ultimate offensive act is reasonably attributable to the independent

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[5] This sliding assessment can be aided by reference to proximate cause, vicarious liability, and other well-developed legal doctrines regarding the attribution of one's actions to another. *See generally* Frederick Mark Gedicks, *Substantial Burdens*, (J. Reuben Clark Law School, Brigham Young University, Working Paper No. 15-18 (2015)).

choice of a third party.[6] "A religious adherent's distaste for what the law requires of a third party is not, in itself, a substantial burden." *Priests for Life v. U.S. Dept. of Health and Human Services*, 772 F.3d 229, 256 (D.C. Cir. 2014).

The interests of third parties dictate the balance in the instant cases. *See, e.g., Univ. of Notre Dame*, 786 F.3d at 619 (7th Cir. 2015) ("[W]hen we compare the burden...of having to establish some entirely new method of providing contraceptive coverage with the burden on Notre Dame of simply notifying the government that the ball is now in the government's court," there is no substantial burden.). Petitioners' attempt to prevent the Government from requiring insurance companies to separately provide contraception coverage threatens a detrimental effect on the independent choices of its employees—indeed, limiting their employees' access to contraception is the entire point of their request.[7] Yet employees have independent rights to access contraception as part of their sexual privacy, as first recognized in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); they also have independent religious beliefs, which may or may not

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[6] Article III also recognizes this limitation: injuries must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). RFRA itself defines standing under the Act by reference to Article III. 42 U.S.C. § 2000bb–1(c).

[7] This is no corner-case concern: Petitioners' objections, if credited, would adversely affect tens of thousands of employees and dependents who are eligible to receive third party contraceptive coverage through the current accommodation system. *See* Resp't Br. at 20.

converge with their employers'. In order to uphold employees' important constitutional interests, RFRA's substantial burden analysis must take into account third party agency.

D. Objective Analysis Of Substantial Burdens Best Promotes Religious Freedom

Amici all cherish the protections for free exercise enshrined in the Constitution, expanded by RFRA, and afforded to all Americans. But they likewise cherish the constitutional precept that all individuals are entitled to the equal protection of our nation's laws. As this Court recognized at the apex of the pre-*Smith* era, "[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *See Thomas*, 450 U.S. at 716. This insight applies not only to religious claimants before the courts, but also to the individuals who are *not* present but profoundly affected. The Court should not choose to prefer a religious organization on the one hand, or its individual employees or members on the other, when their religious beliefs may conflict.

After all, "[a] broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of

their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng*, 485 U.S. at 452.

Amici encourage the Court to strike a balance. RFRA's accommodations should be granted after an objective multi-factored assessment of whether government action substantially burdens religious exercise, taking care to account for the independent actions of religiously diverse third parties. There is room for "play in the joints," *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 669 (1970), where all are respected within the fair bounds of their own religious persuasions, while none are substantially burdened.

CONCLUSION

The decisions below should be affirmed.

Respectfully submitted,

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